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COUNTER STATEMENT OF QUESTION PRESENTED

In claims for benefits under the Longshore and Harbor Workers Compensation Act and the Black Lung Benefits Act, administrative law judges applied a rule of doubt concerning evidentiary conflict by virtue of which "any doubt" on "an" issue was resolved in the claimant's favor. This rule, when created and as employed thereafter, established a standard of proof applicable to the evidence of a longshore employee or his dependent family which is less than the preponderance; and, in fact, required the employers to abolish doubt of fact.

The question in these cases is whether either the "true doubt" rule now offered by the agency which, instead, shifts the burden of persuasion of fact by the preponderance to the employer, or the actual doubt rule applied in both cases subject to this petition, is both a permissible and reasonable agency determination to which deference is owed where statutes are silent. Petitioner claims, alternatively, that the "true doubt" rule is long established and sound law. Respondent claims that the Longshore Act is not silent and that any doubt rule violates it and the Administrative Procedure Act; and where applied to Longshore Act benefit claims it acts as a replacement for, and materially alters the effect of, that statute's presumption that "the claim comes within the provisions of this chapter"; and is unconstitutional.

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STATUTORY PROVISIONS

Sections 902(2), 903(a), 920 and 921(b)(3) and (c) of the Longshore and Harbor Workers Compensation Act and Section 577(a) and (c) of the Administrative Procedure Act are reprinted at App., infra, 1a.–4a.

STATEMENT

In *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 1284 (3 Cir, 1993), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Section 901 *et seq*) case subject to the agency's Petition, the court of appeals held that Administration Procedure Act Section 7(c), 5 U.S.C. Section 556(d), establishes a standard of proof by the preponderance of evidence *and* allocates the burden of persuasion to the claimant seeking compensation benefits pursuant to Longshore Act Section 3(a) (33 U.S.C. Section 903(a)). As a result, it vacated an award of benefits after a Section 19(d) hearing which is governed by the Administrative Procedure Act, 5 U.S.C. Sections 500-559, based upon a determination by an administrative law judge that the issue upon which right to benefits depended was "still deemed to be debateable" (JA 55)[1]; and in order to find entitlement despite failure of proof by a preponderance of all of the evidence, the fact finder applied the rule " . . . that doubt concerning evidentiary conflict should be resolved in Claimant's favor . . ." (JA 50).

The Benefits Review Board affirmed the award, finding that the evidence had been determined to be "in equipoise" (JA 28) by the administrative law judge although he had not so concluded, and otherwise deciding, although the fact finder had not so held, that essential proof offered by the benefits claimant had been found to be credible. Upon appeal to the

[1] Citations preceded by "JA" are to the Joint Appendix.

Review Board and the court of appeals, respondent, Maher Terminals, argued that any rule applied in Longshore Act benefits claims permitting resolution of doubt in claimant's favor in the event of evidentiary conflict impermissibly treated the Act's Section 20(a) presumption "[t]hat the claim comes within the provisions of this chapter" as "evidence". It also argued that "substantial evidence" sufficient to rebut this presumption—proof as this Court held in *DelVecchio v. Bowers*, 296 U.S. 280 (1935) sufficient to justify a result contrary to what the statute presumes—was the same as "substantial evidence" justifying an award of benefits upon review pursuant to Longshore Act Section 21(b)(3) and (c), with the result that Congress could not have intended fact finding be biased in favor of the employee or his or her dependent family. In affirming, the Board held that the "evidentiary conflict" rule applicable to fact finding when the right to Longshore Act benefits is controverted requires the administrative law judge to decide "all doubtful issues of fact" (JA 28) or "any doubt [which] remains as to how an issue is to be resolved" (JA 29) in claimant's favor. It rejected respondent's argument "regarding the inapplicability of the true doubt rule" based upon *DelVecchio v. Bowers*, *supra*, holding that the rule "comes into play only once the presumption is rebutted and falls out of the case" (JA 29). The court of appeals also rejected all respondent/employer's arguments based upon the Longshore Act or any case interpreting it, holding that since the administrative law judge had properly found the Section 20(a) presumption invoked and rebutted it had not been a factor in his decision and for that reason need not be considered (JA 13). As a result, the court of appeals dealt with all issues raised by the parties on the basis of the Administrative Procedure Act, only.

Petitioner argues before this Court that although the Procedure Act establishes a preponderance of evidence standard (Pet. Brief p.17) it and the Longshore Act do not provide who as between the benefits claimant and the employer has the burden of persuasion of fact. The agency then claims that it

and the court of appeals have authority under this Court's holding in *NLRB v. Transportation Management*, 462 U.S., 383, 403 n.7 (1983) to change the customary burdens of persuasion since "permissible" to do so; and that this Court should defer to the agency's position. No effort to scrutinize what the Longshore Act provides, or to consider cases interpreting it, is made. Petitioner offers as an answer to an alleged gap in both statutes an agency "determination" (*Ibid.* p.15) which it does not acknowledge, since not the subject of regulation, has the effect of a legislative rule as it both supplements a statute (*National Family Planning v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir 1992)) and, as will be shown, effects a change in existing law or policy (*Powderly v. Schweiker*, 709 F.2d 1092, 1098 (9th Cir 1983)). The agency's answer does not, however, require "any" doubt on "an" issue be resolved in claimant's favor, it allocates the burden of persuasion to the employer on all issues necessary to an award of benefits and was offered for the first time in the court of appeals in the cases subject to its petition. The agency calls its statutory supplement the "true doubt" rule, which in error is said to be applied by the Department of Labor in adjudicating claims for benefits under both the Longshore and Harbor Worker's Compensation Act and Black Lung Benefits Act (30 U.S.C. Section 901 *et seq*). In a proceeding to enforce a claim for benefits under either, according to petitioner: ". . . in order to prevail, the claimant must . . . . adduce evidence that is both sufficient to justify a finding in his [or her] favor and—under the "true doubt" rule—at least equal in overall weight to the evidence adduced by the employer" (*Id.* at p.35-36, n.21). This description, because cast in terms only of what the employee need prove, disguises the rule's converse: The employer's proof is not enough unless of greater weight than the evidence offered by the employee, a fact made plain by the agency's assertion that it determines outcome ". . . in those few cases in which conscientious evaluation leaves the adjudicator unable to conclude that either side has produced a preponderance of the evidence on a particular point" (p.16).

The agency makes the argument that this Court should "defer" to what the agency has "determined" without disclosing how, when or why the determination was made, although ". . . the thoroughness evidence in [an agency's] consideration, the validity of its reasoning [and] its consistency with earlier and later pronouncements . . ." are factors which are to be considered in determining the appropriateness of deference. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

Consistent agency practice, in harmony with the statute and its legislative history, is considered persuasive authority regarding legislative intent (*Steadman v. SEC*, 450 U.S. 91, 103-104 (1981)); and a consistent and longstanding interpretation of an agency, while not controlling, is entitled to considerable weight. *U.S. v. National Assn. Securities Dealers*, 422 U.S. 694, 718 (1975). Deference is *not* owed to ". . . agency litigating positions that are wholly unsupported by regulations, rulings or administrative practices." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 226 (1988). The agency's argument for deference is as a result based upon claim that the "true doubt" rule, which requires that the evidence be first determined to be "otherwise in equipoise" ("Question Presented")—or a prior version or versions thereof not significantly different—was created by the courts of appeals and has long been sound law; which, if true, would mean that deference to its determination concerning the statute which it administers is not relevant. Petitioner then asserts that this Court must accept the agency's position if it can be shown not to "contravene" the Administrative Procedure Act, which is applicable to hearings of Longshore and Harbor Workers' Compensation Act benefits claims by virtue of 33 U.S.C. Section 919(d), Section 19(d), (Pub.L. 92-576 (1972)) and to the Black Lung Benefits Act claims by Longshore Act incorporation (30 U.S.C. Section 932(a)), as well as by regulation, 20 C.F.R. 725.452(a). The argument is not based upon any claim of deference since the Procedures Act is not a statute the agency administers; and if as petitioner

claims the Procedure Act does not contain an explicit rule of substantive law establishing who has the burden of persuasion, *no* allocation *can* contravene any specific provision of it.

The burden-shifting doubt rule dependent upon a preliminary finding of evidentiary "equipoise" now offered by the agency has never before been adopted in Longshore Act cases. This is established by the absence of any Benefits Review Board or court of appeals case insisting that the finder of fact determine that the supporting and opposing evidence on any issue essential to entitlement to benefits be so equally convincing as to make decision impossible before affirming an award where the doubt rule has been applied. Instead, it has been sufficient if the administrative law judge "analyz[ed] and evaluat[ed]" the conflicting evidence and, "conclud[ing] that some essential aspect of the case still remains doubtful", "he or she . . . identif[ied] that aspect of the case and appl[ied] the resolving doubts rule." *Betz v. Arthur Snowden Co.*, 14 Ben.Rev.Bd.Serv. 805 (1981). As explained by the Benefits Review Board and the agency, the "resolving doubts rule" or the "true doubt rule" (JA 29) differ from the " 'true doubt' rule" because the former is triggered by the mere existence of "any doubt" and the latter only by a determination of equal weight of evidence. For this reason the agency position represents an alteration of an existing rule, although both rules establish the employer's obligation to disprove fact.

The "true doubt" rule to which the agency would have this Court defer is an afterthought even in the two cases subject to this petition—neither was decided on the basis of the rule which it attempts to justify as a reasonable response to alleged legislative silence. In the claim against Maher Terminals the finder of fact never even weighed the evidence supporting and opposing the claim based upon alleged connection between the deceased employee's injury at work and later-occurring disability and ensuing death caused by cancer of the cervical spinal cord. Instead, respondent/employer's evidence that the deceased's astrocytoma had escalated in malignancy sponta-

neously, destroying the spinal cord "without reference to any external event" (Pet. Brief, p.9), was rejected by the administrative law judge as "inconsistent with the purposes and policies of the Longshore Act" (JA 55). In addition, he awarded benefits based upon doubt on an issue of causality of his own invention denied by both claimant and the employer and only thereafter determined the question to be "debateable" (JA 55), while characterizing the proof as "equally probative" for the first time in denying respondent's petition for reconsideration (JA 34). It was also never questioned other than by the ALJ whether the issue of causality was "incapable of scientific resolution". Instead, claimant asserted that disability and death for which benefits were sought resulted from "edema" caused by an accident at work, a factual question, although novel, of no great complexity and not different from similar issues resolved by referral to contemporaneous records and consideration of inherent plausibly both by the courts and administrative law judges routinely. Moreover, although claimant's edema " 'theory' " (JA 51) about which the fact finder expressed grave doubt and therefore indicated no difficulty evaluating can be said to have been probative, independent of its believability, since having "any tendency" to make the existence of a fact at issue more probable (F.R.Evid. 401), he made *no* finding that it was credible. The Benefits Review Board also impermissibly rewrote the fact finder's decision (see, e.g., *Walter Tantzen, Inc. v. Shaughnessy*, 601 F.2d 670,672, n.2 (2nd Cir. 1979)) by concluding that the administrative law judge's award had been "based on" (JA 28) the opinion of claimant's medical expert, although, instead, the fact finder had relied upon the existence of doubt; and, in addition, holding that: "All of the employer's arguments regarding the credibility of . . . [deceased's doctor's opinion] were considered below and rejected in turn" (JA 31). The Board so held despite the fact that the ALJ observed:

". . . there is some merit in the employer's position . . . that, in effect . . . [the employee's doctor's] . . . opinion is a gratuitous 'theory' to put the Claimant's case in the best light" (JA 51).

Although the "true doubt" rule was *not* applied, the agency nonetheless argues that the awards in both cases subject to its petition were entered in accordance with law; but for this reason it cannot in candor say that its rule is "sound in practice" (Pet. Brief p.23) Moreover, the rule which without question was applied is *invalid* as petitioner, because it offers a substitute, must be assumed to agree. The agency's "true doubt" rule presents a paradox arising from its claim of statutory silence upon which *every* aspect of its argument depends: The Longshore Act contains presumptions which assist the benefits claimant establish his or her case. As a result of the agency's burden-shifting doubt rule the claimant *needs no* assistance because it is supposedly reasonable to conclude that Congress intended *all facts* essential to an award of benefits be presumed until disproved *by stronger evidence*. This Court, in order to agree, must decide that Longshore Act Section 20 which contains presumptions which *do not* require stronger rebuttal evidence, is surplusage. In addition, there *is* a view that presumptions are created for reasons of policy and not just procedural convenience; and that any presumption *should* not only shift the burden of producing evidence but the burden of persuasion as well; and the "true doubt" rule is identically based upon policy and achieves precisely the same result as this view of presumptions long rejected in federal jurisprudence.

Whether the "true doubt" rule is identical to this view overruled by *DelVecchio v. Bowers, supra* and rejected by Congress in enacting F.R.Evid. 301 which, moreover, is fundamentally antagonistic not only to federal law but all American law, is not considered by the agency. It also does not acknowledge that even the cases applying the actual doubt rule are authority for the view that the Longshore Act imposes

the burden of persuasion generally upon the benefits claimant and not the employer. Petitioner, thus, avoids the more fundamental issues essential to its claim that its allocation *is* "permissible" simply by claiming that the statute is silent and then urging deference. It does so because in the case against Maher Terminals the court of appeals rejected argument that any doubt rule impermissibly treats the Section 20(a) presumption as evidence (JA 13), and abandoned any reliance on the Longshore Act or any case interpreting it by holding that Administrative Procedure Act Section 7(c) establishes who has the burden of persuasion as well as the standard of proof by the preponderance. This and the fact that the agency ignores the significance of the mere existence of Longshore Act Section 20 permits it to argue that because "neither the BLBA nor the LHWCA contains . . . a provision that allocates the burden of persuasion to the claimant, and that Section 7(c) does not impose such a requirement government-wide where the particular statute at issue does not do so" (Pet. Brief, pp.41-42, n.25); and that the "Question Presented" is only ". . . whether the 'true doubt' rule contravenes the Department's own regulations of Section 7(c) of the Administrative Procedure Act". For this Court to agree with the agency's position it must conclude that the Longshore Act and the Administrative Procedure Act are, in fact, silent; and that Congress intended in proceedings to enforce claims under the Longshore and Black Lung Acts that the agency, despite not having such adjudicative authority, can determine that all facts upon which the award of benefits depends should be presumed. Since a Longshore Act doubt rule materially different from the "true doubt" rule was actually employed, it must consider respondent's objection to this rule as well as the one the agency now proposes. If the "true doubt" rule is different from the rule which actually was applied, petitioner's argument is no more than that, guided by the Longshore Act's "humanitarian" purpose, it can impose any rule it chooses whatever its impact upon employers.

SUMMARY OF ARGUMENT

The court of appeals in holding that the doubt rule contravenes the Administrative Procedure Act, ruled correctly. The APA was enacted in order to prevent agencies from searching for evidence which could be said to be substantial and acting where proof did not preponderate, the same result that treating presumptions as evidence and any doubt rule achieves. Deference is not owed because there is no precondition of Longshore Act statutory silence. The Longshore and Harbor Workers' Compensation Act contains presumptions assisting the benefits claimant which are incorporated in the Black Lung Benefits Act. Thus, the Longshore Act, and by incorporation the Black Lung Act, are not silent on the question of who, as between the benefits claimant and the employer, bears the burden of persuasion of fact. Both Longshore Act Section 20 ("Presumptions") and 21 ("Review of Compensation Orders") refer to "substantial evidence" and the same standard of proof sufficiency applying in determining what evidence rebuts a presumption is applicable in deciding whether an award of benefits should be affirmed, which means that the Longshore Act was not intended to be biased in its fact finding function. A compensation order is non-reviewable if an award of benefits is based on doubt applied to resolve evidentiary conflict; and the agency's rule and the actual rule are, hence, irreconcilable with Longshore Act Section 921(b)(3) and (c). Both doubt rules impermissibly treat presumptions as evidence and cannot be applied in Longshore Act cases since there is no rational connection between their presumption of compensability and the fact of entitlement to benefits, claimed, as here, pursuant to Longshore Act Section 3(a) and 2(2), and for this reason they violate due process. No doubt rule is a sound interpretation of Congress' intent in amending the Longshore Act in 1972 to broaden its coverage and vastly increase benefits; which, if adopted by this Court, would have potentially crippling impact on Longshore Act employers.

POINT I

THE LONGSHORE ACT DOUBT RULES

According to the agency, its interpretation is a refinement (Pet. Brief, p.23) of a "longstanding" rule (*Ibid.*, pps.25,26) created in disputed benefits claims under the Longshore and Harbor Workers Compensation Act very soon after its enactment (March 14, 1927, Chapter 509, 44 Stat. 1424). Petitioner asserts that for "fifty years or more" administrators in finding facts and the courts in reviewing Longshore Act awards: "have applied *some variation of* the principle embodied in the 'true doubt' rule" (*Id.* at p.15, emphasis added)—that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman"—and that this ". . . principle, refined over time . . . has come to be known as the 'true doubt' rule" which ". . . has proven sound in practice and indeed has become an integral part of the administrative scheme" (p.23). The "principal", which is not limited to issues requiring "scientific resolution", *is* a view which certain of those interpreting and administering the Longshore Act over its long history have attempted to impose in a variety of ways of which the "true doubt" rule is only the latest.

Because the Longshore Act can be said to have "humanitarian" purpose, the courts, consistent with the statute's provisions, have structured rules regarding what need be proved in favor of the employee or his or her dependent family. For example, when an injury at work aggravates, accelerates or only combines with a pre-existing condition the entire resulting disability is compensable (*Independent Stevedoring Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966)); and under the Longshore Act to hasten death is to cause it (*Avignone Freres, Inc. v. Cardillo*, 117 F.2d 385, 386 (D.C. Cir. 1940)). The early cases referring to resolving doubt in the benefits claimant's favor upon which petitioner relies: *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932); *Southern S.S. Co. v. Norton*, 101 F.2d 825 (3rd Cir. 1939); *Southern Pac. Co. v. Shippeard*, 112 F.2d 147 (5th Cir. 1940) played their role in the developing law of what a Longshore employee need prove, and had nothing at all to do with how facts were to be found. The first case to extend the rule's formulation as opposed to its application to doubts "including the factual" was *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955), a case where a finding that an injury at work had caused disability but prolonged life—with the result that disability but not death benefits were owed—could not be upheld since not in accordance with law. It has, however, long been thought that the principle must also be applied to the separate question of how facts are to be found in a proceeding to enforce a claim for benefits; and this being so, it should be expected that the initial effort to so extend it would have been based on provision of statute, not its alleged "policy" or "purpose". When a presumption such as Longshore Act Section 20(a), which provides that it "shall be presumed in absence of substantial evidence to the contrary–[t]hat the claim comes within the provisions of the chapter" exists—if presumptions are "evidence", i.e., if they do not disappear upon presentation of proof sufficient to justify a contrary result but add weight after rebuttal supporting a finding of any fact presumed—the burden of persuasion, because in every case opposing evidence must be stronger, *is* transferred from the party in whose favor the presumption was created (the claimant who therefore must be assumed to originally have had it) to the disfavored party (the employer). Were this view correct, the principle of doubt resolution in the employee's favor would be realized; completely so in the event the evidence to overcome what the statute presumes is not enough even if of greater weight than that of the employee, but must "induce conviction".

The requirement that the employer in order to rebut a presumption "induce conviction" in the mind of the finder of fact was the original Longshore Act doubt rule. It was created in

Bowers v. Hoage, 76 F.2d 996 (D.C. Cir. 1935), a case involving the effect of the Act's Section 20(d) presumption against death by suicide which relied upon *Fidelity & Casualty Co. of New York v. Burris, supra*, the first Longshore Act decision to mention the concept of resolving doubt in the claimant's favor. If, however, presumptions are not evidence but "fall[] out of the case" when rebutted by substantial evidence which need only be "sufficient to justify" a contrary result and as a result only "control the result where there is an entire lack of competent evidence" as this Court in *DelVecchio v. Bowers*, 296 U.S. 280 (1935) held in reversing *Bowers v. Hoage*, it is possible, but not proper, to conclude that the principle can nonetheless be given effect by applying a lessened standard to proof introduced by the employee and a correspondingly higher one to that offered by the employer. Such a doubt rule applicable to Longshore Act benefit claims, based not upon any provision of statute but its "policy", was created in *Young & Co. v. Shea*, 397 F.2d 185, reh.den. 404 F.2d 1059 (5th Cir. 1968). It requires: ". . . all doubtful fact questions . . . be resolved in favor of the injured employee or his dependent family" and it is different from petitioner's "true doubt" rule because it does *not* allocate the burden of persuasion to the employer it lowers the standard by which claimant's evidence is to be judged below proof by the preponderance, as the court held in the case in which it was invented. See, *Young & Co. v. Shea, supra*, 397 F.2d at 185: "Under 33 U.S.C. Section 903(a) the claimant has the burden of proving all that is not presumed by virtue of Section 920"; and "[t]he standard of persuasion is less before the commissioner than before the court" (at 189). This rule of doubt assumes that such a lessened standard does not contravene the Administrative Procedures Act, just as petitioner's burden-shifting "true doubt" rule allegedly does not. This assumed, the actual doubt rule survived challenge in the next case to apply it, *Strachan Shipping Company v. Shea*, 406 F.2d 521, 522-523 (5th Cir. 1969), because that court rejected argument that ". . . the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit" was contrary to the legislative history of the Administrative Procedure Act, which this Court had held in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951) was applicable to Longshore Act benefit claim determinations although formal incorporation occurred only with enactment of Section 19(d) in 1972 (Pub.L. 92-576).

This actual rule also requires that the employer's proof induce conviction in the mind of the finder of fact; and depending upon whether a particular administrative law judge might choose as a matter of his or her discretion to apply it at all (Brief, Resp. Santoro, pps. 44-45), if extended to its limit can require the employer to prove that a Longshore Act employee is *not* entitled to benefits beyond a reasonable doubt, if not more. This rule is said *not* to treat presumption as evidence, because it applies only after the facts presumed by virtue of Longshore Act Section 20 are rebutted, and all doubts are resolved in favor of the employee only in the fact finder's ensuing consideration of all of the evidence pro and con. See, e.g., *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980). If the standard applicable to a Longshore Act employee's proof is less than the preponderance of evidence because he or she is given the benefit of *every* doubt, all that need to be established in order to prove entitlement is that it is *possible* that an injury occurred or conditions at work existed which *could have* caused the harm for which benefits are sought. Since under any workers' compensation statute harm is disability, if "injury" is "something gone wrong with the human frame", benefits are owed if only claimant offers evidence that such an occurrence might possibly have been work-related. See, e.g., *Noble v. Drake Drilling Co.*, 795 F.2d 478 (5th Cir. 1986). This analysis leaves the employer with the obligation to prove a negative—that neither injury nor working conditions played any part in bringing about whatever it was that led to disability—a burden which can *create* an issue "incapable of scientific reso-

lution", obviously. See, e.g., *Wheatly v. Adler*, 467 F.2d 307 (D.C. Cir. 1968). Under this interpretation Longshore Act benefits become disability and/or life insurance, as this Court recognized in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, n.10 (1982).

In *Young & Co. v. Shea, supra*, the actual doubt rule was invoked to affirm an award in response to argument for collateral estoppel, and it would not seem that the fact finder had actually relied upon doubt in awarding benefits. The effect of this rule was to discourage appeals; and it was adopted at a time when the federal district courts to which appeals then were initially taken were overburdened by longshoremen's suits for damages. See *Turner v. Transportacion Maritima Mexicana*, 44 F.R.D. 412 (E.D. Pa. 1968). It is not required that the rule actually be applied. In *Sprague v. Director, OWCP*, 688 F.2d 826 (1st Cir. 1982), a case which respondent Santoro recognizes establishes that use of the *Young & Co. v. Shea* doubt rule is discretionary, the court of appeals affirmed denial of benefits in a case where the facts were said to be "close" and the doubt rule was not applied despite the court having adopted the actual Longshore Act rule in *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978); and the first Longshore Act case to mention the effect of evidentiary equipoise if found by an administrative law judge appears to be *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 (D.C. Cir. 1990). Efforts to rationalize the actual doubt rule are also confused. The approach when *Del Vecchio v. Bowers* is cited is, as mentioned, to hold the rule applicable only after the Section 20(a) presumption is rebutted. Where not, it has been said to be applicable in deciding whether a Longshore Act presumption *has been* rebutted. (See, e.g., *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982); *Hensley v. Wash. Metro Area Transit Authority*, 655 F.2d 264, 267, 268 (D.C. Cir. 1981), an interpretation only better illustrating the impossibility of reconciling any doubt rule with this Court's *Del Vecchio v. Bowers* holding that presumptions are not evi-

dence and are rebutted by evidence sufficient to justify a contrary result. The Court of Appeals for the District of Columbia applies the *Young & Co. v. Shea* doubt rule although it contradicts its holding in *Charlton v. FTC*, 543 F.2d 903 (D.C. Cir. 1976): ". . . in American law a preponderance of the evidence is rock bottom at the fact finding level of civil litigation" and "nowhere in our jurisprudence can we discern acceptance of a standard of proof tolerating something less than the weight of the evidence" (at p.907). In *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1982), a case mentioning the doubt rule where denial of benefits was reversed, the court of appeals held that "all doubtful questions of fact [are to] be resolved in favor of the injured employee", and on this basis determined that "the administrative law judge did not require the burden of proof to be shifted to the employer". It so held without citing *Gooding v. Willard*, 209 F.2d 913,916 (2nd Cir 1954) in which the same court stated: "the burden to show that the accident was a contributing cause of death was on the . . . [claimant]". See also, *Eschbach v. Contractors Pacific Naval Air Bases*, 181 F.2d 860 (9th Cir. 1950) which held that in Longshore Act cases the claimant has the burden of proof. Moreover, *Young & Co. v. Shea, supra*, fails to mention *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693,695 (5th Cir. 1962) in which the same court had said "the burden of showing the accident caused an acceleration of death of the employee was on the claimant". No court has held as petitioner urges that the risk of non-persuasion on all issues of fact rests with the employer when the evidence is in equipoise, and the existence of cases, in which the doubt rule is, of course, not mentioned, reallocating the burden on a secondary issue further establishes how different the "true doubt" rule is compared with prior applications of the agency's principle.

As with every actual doubt rule case each Longshore Act decision treating any issue as an affirmative defense also contradicts petitioner's claim that the employer has long been

held to have the burden of persuasion on all issues of fact. In *Newport News v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979) it was said that once disability from Longshore Act employment is established, the "burden shifts to the employer, the proponent of a finding of *less* than total disability, to prove that alternative employment is available", since otherwise the employee "would have the burden of proving a negative fact—something that the law rarely, if ever, imposes". See also, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.C. R.I. 1969); *American Stevedore, Inc. v. Salzano*, 538 F.2d 933 (2nd Cir. 1976); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980), the last a case cited with approval by petitioner (Brief p.21) apparently because the agency does not realize its significance. In addition, every Longshore Act case deciding what questions of fact the Section 20(a) presumption extends, its effect, and how it is rebutted, demonstrates that the "true doubt" rule is not employed. See, *infra*, pp.24-25. That the "true doubt" rule is entirely new is, however, *conclusively* established by the fact that the Board and not the fact finder found the evidence to be "in equipoise"; and the former and not the latter determined the alleged credibility of respondent Santoro's "edema theory". Additionally, since the actual lowered standard of proof doubt rule and not the agency's novel burden-shifting variation of the principle, in fact, was applied, had the agency thought that a rule of doubt applicable to "evidentiary conflict" where "any doubt" on "an" issue exists was not proper, it would have sought remand to the administrative law judge in the court of appeals and would *not* have petitioned the Court in effort to have the award affirmed. In sum, the "true doubt" rule represents a litigation position if for no reason other than the agency, without so acknowledging, proposes that this Court defer to a determination creating a rule which was not actually employed.

It is the doubt rule created in *Young & Co. v. Shea, supra*, which was applied by the Benefits Review Board in Longshore Act proceedings in *Betz v. Arthur Snowden Co., supra*, a decision adding only requirement of explanation of fact finder doubt since otherwise benefits awards made on this basis would escape even semblance of review for purpose of determining whether "supported by substantial evidence" pursuant to Longshore Act Section 21(b) and (c). When explained, awards of benefits are affirmed since fact finder doubt is treated as though it were substantial evidence. The actual rule cannot, however, be law in the event—irrespective of who has the burden of persuasion generally or on a secondary issue—the party obliged must establish facts by the preponderance. Because in *Steadman v. SEC*, 450 U.S. 91 (1981), this Court, based upon legislative history, held that the Administrative Procedure Act imposes such a standard of proof, the agency concedes that the third sentence of Section 7(c) of the Procedure Act (5 U.S.C. Section 556(d)) ". . . requires . . . whichever party bears the burden of persuasion on an issue . . . generally (sic) establish it by the preponderance of the evidence. . ." (Pet. Brief, p.35). For this reason, petitioner, of necessity, abandons the actual doubt rule without admitting that it has done so and offers as a mere variation or refinement of an existing rule—although it is different in its standard of *dis*proof as well as mandatory and not discretionary in its application—a *third* means of imposing its alleged principle upon Longshore Act employers.

Since presumptions are not evidence assisting the party in whose favor they are established *and* the standard applicable to the party burdened is proof by the preponderance, the agency's "true doubt" rule reallocating the risk of nonpersuasion on all issues of fact is the only remaining way to skew the Longshore Act in its fact finding function so as to favor the employee at the expense of the employer. For the principle in its final version to be implemented in a

way best realizing the "humanitarian purposes and policies of the Longshore Act"—for doubts to continue as far as possible to be resolved in the employee's favor—the broadest imaginary zone for the fact finder to award benefits after declaring evidence favoring and opposing entitlement to be "in equipoise", "evenly balanced" or "equally probative" must be created. The "true doubt" rule's predicate—that the finder of fact no matter the extent of his or her conscientious scrutiny not be able to do better than decide that the evidence supporting entitlement to benefits is of exactly equal persuasiveness compared to that opposing it—is, however, but a restatement of the familiar rule that unless the evidence of party having the burden preponderates it loses. Moreover, because the "true doubt" rule is a principle of required use in all cases; and as petitioner concedes it, in fact, does reallocate the burden of persuasion (Brief, p.14), petitioner cannot, and does not, claim that it is applicable, as opposed to outcome-determinative, in "few cases" *Ibid.*, p. 16) or in "narrow circumstances" (*Id.*, p. 34). That this latest Longshore Act rule of doubt should be adopted is, however, a view *not* shared by respondent/claimant in the case against Maher Terminals, Inc. She claims ". . . some difficulty with using the concept of the evidence being 'in equipoise' "; and would retain the actual rule allowing the fact finder to award benefits based upon doubt as a discretionary exercise whenever the administrative law judge believes it indicated ". . . based upon strongly expressed legislative intent and social policy" (Brief of Resp. Santoro, p.44). Thus, that the "true doubt" rule is materially different is also demonstrated by the rejection of it by the party on whose behalf the agency intervenes.

POINT II

DEFERENCE DOES NOT APPLY TO THE AGENCY'S DETERMINATION OF WHO IN A LONGSHORE ACT CASE BEARS THE BURDEN OF PERSUASION

Petitioner asks deference to a determination of policy which the petitioner in error claims "the Department of Labor" applies "[i]n adjudicating claims for benefits under the Longshore and Harbor Workers' Compensation Act . . .", although the agency has had no power to adjudicate claims for Longshore Act benefits since 1972. In 1972, Congress, in amending Longshore Act Section 19 to formally incorporate the Administrative Procedure Act, provided: "Notwithstanding any other provisions of this chapter, any hearing . . . shall be conducted in accordance with the provisions of Section 554 of Rule 5" (19(d)). As petitioner states (Brief, p. 47, n.28), until 1972 the Department of Labor investigated, heard and decided controverted claims for Longshore Act benefits despite provision of 5 U.S.C. Section 554 requiring that an agency employee involved in investigation or prosecuting not participate in the determination. Although the agency also does not decide claims under the Black Lung Benefits Act, the deference issue is different applied to that statute compared to the Longshore Act. The fundamental justification of deference is that the agency determination is made based upon either expressly delegated authority or is a reasonable interpretation where the statute is silent is the administrator's "special competence". See, *NLRB v. Weingarten, Inc.*, 420 U.S. 251,266 (1975). This Court has found this special competence and Congressional delegation of administrative authority (*Adams Fruit v. Barrett*, 484 U.S. 638,649 (1990)) to exist in cases involving Black Lung Benefit Act claims because that statute has a ". . . complex and highly technical regulatory program . . ." which involves: "Identification and classification of medical eligibility criteria necessarily requiring significant expertise and entailing the exercise of judgment grounded in

policy considerations . . ." *Pauley v. Bethenergy Mines*, 501 U.S. ____, 111 S.Ct. 2524, 115 L.Ed.2d 604,624 (1991). The Black Lung Benefits Act was enacted in response to Congressional finding that ". . . . a significant number of coal miners living today . . . are totally disabled due to pneumoconiosis arising out of employment in the Nation's mines" (30 U.S.C. Section 901). It provides benefits for occupational disease as opposed to injury and although it incorporated certain provisions, including Sections 19, 20, 21 and 23, of the earlier enacted Longshore Act, Section 3(a) thereof and the Act's "injury" definition (Section 2(2)) at issue in the case against Maher Terminals were not included. See, 30 U.S.C. Section 932(a). Moreover, the Black Lung Act Section 902f(1)A specifically provides that the Department of Labor ". . . shall establish regulations which shall provide that a miner shall be considered totally disabled when pneumoconiosis presents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine . . . in which he or she previously engaged with some regularity over a substantial period of time . . ." Further, the legislative history of amendments to the Black Lung Act state ". . .[i]n the absence of definitive medical conclusion . . ." there is ". . . a clear need to resolve doubts in favor of the disabled miner or his survivors . . ." S.Rep.No. 743, 92d Cong., 2d Sess. (1972).

In the Longshore Act Congress delegated rule making authority to the agency with respect to "Procedure in Respect of Claims". In addition, Section 39 provides generally for administration by the Secretary of Labor and Section 41 contains a broad grant regarding "Safety Rules and Regulations". Unlike issues arising under the Black Lung Benefits Act, the Department of Labor has *no* expertise in determining what constitutes "disability [which] results from an injury" which Longshore Act Section 3(a) provides is a basis for an award of benefits; or what constitutes "injury arising out of and in the course of employment" (Section 2(2)), concepts explained

in *U.S. Industries/Federal Sheet Metals, Inc., supra*, without aid of any Department of Labor determination. An interpretation of a Longshore Act provision was offered to this Court by the agency is *Estate of Cowart v. Nicholas Drilling*, 505 U.S. ____, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) in which the Act's Section 33(g) as bar to compensation after settlement by an employee or other person entitled to benefits of a negligence suit or claim ". . . against the vessel as a third party . . ." (Section 5(b)) was at issue, a question of appropriate interest to the Department of Labor since power to act was involved. There is, however, no reason to think that Congress intended that the agency, especially after adoption of Section 19(d) in 1972, have any more power to decide what proof of entitlement to Longshore Act benefits is or is not sufficient than it was given to interpret Section 5(b), and as a result establish a rule regarding what proof of negligence is adequate. The agency's recognition that it was given no authority to determine what quality or quantity of proof is necessary or who must offer it in deciding whether benefits are owed pursuant to Longshore Act Sections 3(a) and 2(2) is demonstrated by the fact and although the Department of Labor has established certain regulations regarding conduct of hearings (see 20 C.F.R. 702.31 *et. seq.*) it has never formally adopted the "true doubt" rule in "any proceeding for the enforcement of a claim for benefits" mentioned in Longshore Act Section 20. In fact, the agency must be deemed to know that it has no power pursuant to the rule making authority it was actually given to reallocate the burden of persuasion. The "true doubt" rule comes with the provisions of 5 U.S.C. 706 if of general applicability and future effect (see, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (concurring op., Scalia, J. at pp.216-217)) and no evidence exists that the agency ever before this case espoused a burden-shifting rule applicable only in cases of evidentiary "equipoise". Its adoption thus would require publication and opportunity for comment pursuant to 5 U.S.C. Section 553 since a new rule as

opposed to interpretive decision. See, *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879,886 (9th Cir. 1972).

Argument for deference is less compelling if inconsistent with previously held views. *Pauley v. Bethenergy Mines, supra*, 501 U.S. at ____, 111 S.Ct. 2524, 115 L.Ed.2d 604, 625 (1991). This should be especially so when alteration in the agency's position results from the fact that it cannot even attempt to justify the rule which was actually applied and this is not explained. Here, the explanation would have to include acknowledgement at least that the rule invoked in order to award benefits cannot be reconciled with *Steadman v. SEC, supra*, which the agency has demonstrated it has not misread; and the fact that petitioner's response is to substitute a new rule for the existing one establishes that the "true doubt" rule is by definition a litigation position to which the principle of deference is not applicable. *Martin v. OSHRAC*, 499 U.S. 144 (1991). Deference does not apply when the agency itself has articulated no position and, where owed, authority to make an interpretation elaborating and enforcing statutory commands must be found to have been delegated to an administrative official and cannot be exercised by appellate counsel. *Industrial Companies Institute v. Camp*, 401 U.S. 617, 628 (1971). In asserting that the Court has deferred to "similar determinations by agencies . . ." petitioner cites three cases, none of which are applicable to or supportive of its position: *NLRB v. Transportation Management*, 462 U.S. 393 (1983) and *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) in which the Court deferred to adjudicative positions of the NLRB and *Steadman v. SEC*, 450 U.S. 91 (1981) in which it held that legislative intent may be discerned from consistent interpretation of a statute by an agency but did not address the issue of deference. Whether the Court should defer to an adjudication by an agency with such power, unlike the Department of Labor, is a question subject to principles articulated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1983); and deference does not extend to "agency pronouncements in less formal formats, e.g., manuals, letters, guidelines, interpretive rules or litigating positions" since Congress does not delegate "to any agency the power to make policy decisions that bind courts and citizens . . ." in such a way. Davis, *Administrative Law Treatise* (3rd Edition, 1994), Section 3.5, pp.119-120. Even more fundamentally, the "true doubt" rule is not an interpretation of the Longshore Act and the agency's position does not supplement it on a question where the statute is silent; instead, it contradicts it.

POINT III

THE "TRUE DOUBT" RULE IS NOT AN INTERPRETATION OF THE LONGSHORE ACT WHICH IS NOT SILENT; AND IT FILLS NO GAP IN THE STATUTE WHICH IT VIOLATES IN THREE RESPECTS

A. The Agency's Rule Deletes Longshore Act Section 20

The principle of deference is inapplicable where the agency interpretation, even where established by regulation, is inconsistent with the statutory scheme considered as a whole. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Deference where express authority to implement Congressional commands is not delegated requires statutory silence on the question subject to agency determination and the interpretation for which deference is sought cannot be inconsistent with prior interpretations of this Court. In such a case the Court adheres to its interpretation under *stare decisis* and it judges the agency's later interpretation against its prior determination. *Ibid.* Where claim is made as here that the statute is silent, the agency's interpretation must appropriately fill a gap in the statutory scheme by articulating a view of the statute expressed by this Court or, at least, not inconsistent with an interpretation which the court has adopted. The agency *need not* claim deference and its resort to such argument cannot in this case be seen other than as a

confession that existing law does not support its interpretation. The invalidity of the "true doubt" rule is shown by the very existence of Longshore Act Section 20.

In enacting the Longshore Act, Congress provided in "proceedings to enforce claims for compensation" that "it shall be presumed, in the absence of substantial evidence to the contrary" that "the claim comes within the provisions of the chapter"; that "sufficient notice of . . . claim has been given"; that "the injury was not occasioned solely by the intoxication of the injured employee", and that ". . . injury was not occasioned by the wilful intention of the injured employee to injury or kill himself or another". Congress has not amended Section 20 to provide, for example, that the presumptions be rebutted only by more persuasive evidence, despite opportunity to do so over fifty-nine years since this Court's decision in *Del Vecchio v. Bowers, supra*. It is not reasonable to conclude that the Longshore Act presumptions say nothing at all about who generally has the burden of persuasion when entitlement to benefits is controverted; and this Court has held that the Section 20(a) presumption "exemplifies the humanitarian nature of the Longshore Act". *O'Keefe v. Smith, Hinchman & Grylls Assoc.*, 380 U.S. 359, 362-363 (1965). When a presumption is created it is intended that one party be preferred with respect to the fact presumed and his or her opponent, accordingly, disfavored. See, generally, McCormick, *Evidence*, Section 343 at p.968 (2d Ed. 1972). Too obvious to belabor were it not for petitioner's argument is that Section 20 assists the employee or his dependent family since its presumptions control the result and require an award of benefits in absence of any proof, as this Court held in *Del Vecchio v. Bowers*. No presumption, however, need exist if the "true doubt" rule is valid, since not enumerated facts but *all* necessary facts are as a result presumed. Because this is so, any case establishing what need be shown to invoke the presumption is mistaken or at least was decided unnecessarily. See, e.g., *Noble Drilling Co. v. Drake, supra* 795

F.2d at 481, a case holding that the fact of injury is not presumed but must be established, as the Benefits Review Board in the case against Maher Terminals also held (JA 40). In addition, consideration of the coverage of Section 20(a) (see, e.g., *Friend v. Britton, supra*, 220 F.2d at 824) is obviated by the agency's interpretation as a result of the "true doubt" rule, and for the same reason that all essential facts are presumed. Nonetheless, in *U.S. Industries/Federal Sheet Metal, Inc., supra*, 455 U.S. at 612, n.5, as petitioner paradoxically acknowledges (Brief, p.10-11, n.8), this Court observed that the "coverage of the Longshore Act Section 920(a) [20(a)] presumption is debatable" but that "[i]t seems fair to assume" that the Section 20(a) presumption "is of the same nature as the presumption created by Section 920(d) . . . as construed in *DelVecchio v. Bowers* . . . and the presumption defined in the Federal Rules of Evidence 301". An aspect of coverage of the Section 20(a) presumption is questioned because sometimes interpreted as limited to "adjudicative" as opposed to "jurisdictional" facts (see, *Employer's Mutual Liability Ins. Co. v. Arrien*, 244 F.Supp. 110 (D.C.N.Y. 1965). Section 20(a) has been applied to most Longshore Act benefit claim issues, including whether disability arises from an injury occurring during and in the course of employment and as a result that benefits are owed. See, e.g., *Swinton v. J. Frank Kelly*, 544 F.2d 1075 (D.C. Cir. 1976); *Travelers, Ins. Co. v. Donovan*, 221 F.2d 886 (D.C. Cir. 1955). It is not applied to the claim of injury. *O'Leary v. Puget Sound Bridge and Dry Dock*, 349 F.2d 571 (9th Cir. 1965)). But if there is to be a "true doubt" rule the "coverage" of this presumption in the sense of to what issues it applies is not "debateable" its very existence is a matter of no significance. In addition, in the claim against Maher Terminals the administrative law judge (JA 41) would have unnecessarily concluded that the employer in order to rebut the Section 20(a) had to offer evidence which was "substantial" and "specific and comprehensive enough to sever the potential connection between the resultant impairment and the work environment" (JA 41). In sum, the Longshore Act Sec-

tion 20 presumptions, which according to the agency impose ". . . a burden of production on the employer" (Pet. Brief, p.35, n.26), are entirely irrelevant if the "true doubt" rule is valid. The production burden, contrary to what the agency suggests, is *not* unimportant. See, *Marra Bros. v. Cardillo*, 154 F.2d 357, 359 (3d Cir. 1946), a case showing the effect of an employer's failure to "prove," i.e., produce, "substantial evidence," i.e., evidence "sufficient to justify" a contrary result and the presumption determined outcome where there was "an entire lack of competent evidence". More importantly, the agency's rule achieves a result which this Court has held Section 20(d) does not. The burden-shifting "true doubt" rule, unlike this presumption, is not overcome by evidence sufficient to justify a contrary result. For this reason, if the "true doubt" rule exists, *Del Vecchio v. Bowers*, is overruled.

It is a fundamental rule of construction of statutes that every word or phrase, to the extent possible, must be given effect (*United States v. Nordic Village*, 503 U.S. ____, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)); and it is never proper to treat, not a word or phrase, but an entire section of a statute, as redundant or as surplusage, and, hence, as meaningless. In effect, the "true doubt" rule replaces Section 20 with a substitute, one achieving the result the agency wishes Congress or this Court had provided. It is a reflection of the agency's dissatisfaction with this Court's *DelVecchio v. Bowers* holding that the Longshore Act Section 20(d) presumption is a procedural device, since it believes the Court failed in so holding to adequately further the statute's "humanitarian purpose". This is no more than the Benefits Review Board and agency's re-legislation to obtain a result more to their liking. *Morrison-Knudsen Const. Co., Inc. v. Director, OWCP*, *supra*, 461 at 635; *Potomac Electric Power Co. v. Director, OWCP*, 499 U.S. 268, 279, 282 (1980). In *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981) this Court held that especially in interpreting the Longshore Act the courts should adhere closely to which Congress has written. Here, the agency would have the court ignore what Congress has written and instead adopt whatever it says is, or should, be law. Where deference is claimed, this Court is, nonetheless, the better and final arbiter of what a statute means or Congress intended in enacting it. *Chevron U.S.A. v. Natural Res. Def. Council*, *supra*, 467, U.S. at 843, n.9 (1983).

B. The "True Doubt" Rule Contradicts the Fact Finder's Duty to Decide Upon Which The Longshore Act Review Procedure Depends

The Administrative Procedures Act Section 557(c)(3)(A) provides that all decisions include "findings and conclusions . . . on all material issues of fact, law or discretion". When resolution of "any doubt" on "an issue" in the claimant's favor is the basis of the award, the Benefits Review Board and the courts of appeals determine only whether the basis for doubt was properly explained; and in the event that the agency's substitute is adopted and the proofs are determined to be of equivalent weight, the Board and courts of appeals cannot determine whether this assessment was reasonable. Under the *Young & Co. v. Shea* doubt rule what is reviewed is not "evidence in the record considered as a whole" but the fact finder's subjective state of mind which cannot be substantial evidence. If the "true doubt" rule is adopted, review of a decision based upon evidentiary equipoise will not be possible since the Board and court are "not to weigh the evidence". See, *Steadman v. SEC*, *supra*, 450 U.S. at 100, n.20. Thus, both rules are inconsistent with Longshore Act Section 21(b)(3) and (c) because they dispense with the Procedure Act duty to decide as well of the obligation of a Longshore Act fact finder to "initially select [ ] the inference which seems the most reasonable", the "propriety" of which ". . . is vital to the validity of the order subsequently entered". *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 at 477 (1947).

C. The Scheme Of The Longshore Act Establishes That Congress Intended That Its Fact Finding Function Not Be Biased

Longshore Act Section 21(b)(3), which provided in 1972 for creation of the Benefits Review Board, states that "[t]he findings of fact in the decision under review shall be conclusive if supported by substantial evidence in the record as a whole". In *Estate of Cowart v. Nicklos Drilling Co., supra*, the Court restated the familiar principle of construction of statutes that ordinarily the same word or statute appearing twice must be given the same meaning. Giving "substantial evidence" the same meaning in both Longshore Act Sections 20 and 21 shows affirmatively that Congress intended the Longshore Act *not* be biased in favor of claimants in finding facts. Presumptions exist and are rebutted by substantial evidence which this Court has defined as evidence sufficient to justify a contrary result. This cannot be seen as a *higher* standard than that applied by the Benefits Review Board and the court of appeals when scrutinizing the record prior to affirming an award of benefits; and, in fact, it is the same standard. That the standard of agency fact-finding is the preponderance of the weight of the evidence does not mean that "substantial evidence" in Section 21(b)(3) and (c) is different from the standard applied in determining whether the Section 20 presumptions have been rebutted; despite the fact that under the former the Benefits Review Board or court deals with evidence *found by* an ALJ to have preponderated while in the latter the fact finder gives effect rebutting the presumption to evidence which he or she may subsequently decide not to believe. Of course, the Benefits Review Board and the court of appeals must affirm an ALJ's determination of fact although neither believes the evidence upon which the award or denial of benefits under review is based. In *Steadman v. SEC, supra*, 450 U.S. at 100, n.20 (emphasis added), the Court acknowledged and agreed with the holding of *Charlton v. FTC, supra* that the fact finder in an administrative proceeding must not misappropriate the standard of review by searching for evidence which might be deemed to be substantial, but must weigh all the evidence by the preponderance standard; and it also held that the ". . . *functions* of initial decision making and judicial review" are "different". The fact that most Procedure Act determinations of fact must be affirmed is not, correspondingly, license to an ALJ to decide fact in the way he or she would prefer; and because the standard of review is a mere search for the existence of substantial evidence, it is, for that reason, *essential* that fact finding be conducted free of influence of notions of statutory "purpose" or "policy" which Congress has not expressed.

It would appear that the doubt rule may have arisen from confusion of the different *functions* of the fact finder and the Board or court and the common *standard* applied by both, the former in determining whether rebuttal evidence is substantial and the latter in deciding whether to affirm or vacate. An administrative law judge in considering whether a Longshore Act presumption has been rebutted cannot weigh evidence any more that the Board or court can in reviewing the ultimate decision. He or she must, instead, judge only its probativeness and by the same standard that F.R. Evid. 401 provides. The court in a jury trial assesses an offer of proof only from the perspective whether it is "relevant" i.e., having "any tendency to make a fact in issue more probably or less probable", and not at all on the basis whether it should or should not be believed. So should an administrative law judge initially consider only whether the employer's evidence has any tendency to prove a presumed fact at issue and, if so, decide if it is also sufficiently comprehensive to justify a contrary result. If not probative at all, or if incomplete, he or she should award benefits. If both probative and complete, the ALJ should consider all of the evidence in light of credibility or other factors affecting weight pro and con; and then decide whether claimant's evidence preponderates. In short, if presumptions are not evidence but procedural devices, the administrative

law judge in deciding whether the fact presumed is rebutted and the Board and court in deciding whether an award of benefits should be affirmed—although their *functions* are different—use the *same standard*. As a result, "substantial evidence" has the same meaning in both Sections 20 and 21 only if there is *no* doubt rule. If this is so, the coverage of the Section 20(a) presumption might be treated as unlimited; and concern for excluding some facts for its scope, in any event, appears to have arisen from the view that the Longshore Act Section 20 presumptions are entitled to evidentiary weight. If Section 20(a) is a procedural device applicable to all issues of fact it is absurd to say that the "true doubt" rule, also applicable to all facts, "comes into play" once the statutory presumption is rebutted. Of course, the mere breadth of the language of Section 20(a) would suggest that Congress was aware that presumptions are not evidence. There is no gap in the statutory scheme for an agency interpretation to fill but only an alleged one created by the failure to recognize that Section 20 means that the agency has concluded in error that the Longshore Act does not specify who has the burden of persuasion.

POINT IV

THE "TRUE DOUBT" RULE WHICH SUPPOSEDLY COMES INTO PLAY AFTER THE LONGSHORE ACT PRESUMPTION HAS BEEN REBUTTED TREATS PRESUMPTIONS AS EVIDENCE

The "true doubt" rule improperly replaces the Act's presumptions with *an interpretation of them* rejected in federal law. For this reason the agency offers a supposed rule which is old wine in a new bottle. No matter how disguised, the "true doubt" rule achieves the same result as treating the Section 20(a) presumptions as applicable to all controverted questions of fact and adopting and extending the "California heresy" (see, Wright and Graham, *Federal Prac. and Procedure*, Vol. 21, Evidence, Section 5126, p.614) that "presumptions are evidence". This mistaken view of what presumptions do was referred to as ". . . this jurisprudential Lazarus" in Congressional hearings prior to enactment of the Federal Rules of Evidence. *Ibid*, Section 5121, p.545; Senate Hearings, p.58. In this interpretation: ". . . it seem[s] foolish for the court so create a presumption that would vanish upon the introduction of contrary evidence" because "presumptions . . . [are] . . . created for reasons of policy, not just procedural convenience". *Id*, Section 5122 at pps.564-565. See, Morgan, Some Observations Concerning Presumptions, 44 Harv.L.Rev. 906 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv.L.Rev. 59 (1933). For this reason it has been believed that ". . . a presumption should have the effect of not only shifting the burden of producing evidence, but the burden of proof as well". Wright and Graham, *supra*, Section 5122, p.565.

This view is opposed by the so-called "Thayer-Wigmore" interpretation. See, Thayer, Preliminary Treatise on Evidence (1899) p.336; Wigmore, *Evidence* 3d.Ed. 1940, Section 2491. See, also, Foreword to the Model Code of Evidence, A.L.I. Model Code of Evidence, 1942, pps.52-65, where the contrast between these opposed versions of how presumptions should properly be treated is explained. There can be no question the "pure Thayerian view" of which *DelVecchio v. Bowers* ("ubi Thayer", 296 U.S. at 287, n.12) is an example (Weinstein's Evidence, Section 301[03], p.301-39 (1993)), has prevailed. Argument that presumptions should have any effect after rebuttal was rejected by Congress in enacting F.R.Evid. 301. See, Proposed F.R.Evid. 301, 51 F.R.D. 315, 336 (1971). It was also rejected by the American Law Institute in Model Code Rule 704(2). See, Sec.18 A.L.I.Proc. p.226, 1941. It was limited in Rule 14 of the Uniform Rules of Evidence, for reason of "what was thought to be constitutional objections to the Morgan approach when there

was no logical connection between the basic fact and the presumed fact". Wright and Graham, *supra*, Section 5122 at p.566. The Thayer-Wigmore interpretation was reaffirmed as the only permissible federal law treatment of presumption in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n.10 (1981), a case, in addition to *DelVecchio v. Bowers* and F.R.Evid. 301, cited in *U.S. Industries/Federal Sheet Metal, Inc., supra*. In fact, the extreme view of what presumptions ought achieve—that presumptions should not just add weight assisting the party favored carry the burden of persuasion but should allocate the burden of persuasion to the party disfavored—has apparently never been adopted anywhere, a fact which in no way deters the agency from reoffering "this jurisprudential Lazarus" disguised by an argument for deference justified of course for the same reasons of policy.

POINT V

BOTH THE "TRUE DOUBT" RULE AND THE ACTUAL LONGSHORE ACT DOUBT RULE OFFEND DUE PROCESS IN LONGSHORE ACT CASES

This Court has held that "inferences and presumptions are a staple of our adversarial system of fact finding" and that "[t]he value of these evidentiary devices, and their validity under the Due Process clause vary from case to case . . . depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently". *County Court of Ulster County v. Allen*, 442 U.S. 140,156 (1979). As the petitioner states: "A legislature, in fashioning a particular program, may (within broad constitutional limits) impose whatever structure of proof it chooses for resolution of civil disputes arising under the statutory scheme" (Pet. Brief, p.19). As the agency also

claims, the courts or an administering agency where, as here, the authorizing statutes provide for adjudication of disputes pursuant to Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), may "change the customary burdens of persuasion" if it is "permissible" to do so. *NLRB v. Transportation Management Corp., supra.*

Whether the Longshore Act Section 20(a) presumption is a procedural tool or instead adds weight to proof offered by the party the presumption favors is crucial since if the latter its application is a potential violation of Due Process of Law. See, generally, Wright and Graham, *supra*, Section 5129. Petitioner refuses to attempt to justify the actual doubt rule not only because it cannot be reconciled with *Steadman v. SEC, supra*, but because it also knows, as the administrative law judge's award in the case against Maher Terminals demonstrates, that it is unconstitutional as well. There is no logical connection between disability and death from cancer of the cervical spinal cord and the presumed fact that such disability or death resulted from an injury arising out of and occurring in the course of employment. Respondent Santoro, more appropriately since the one employed urging this Court to adopt the actual doubt rule, claims, in unstated effort to deflect constitutional scrutiny from the *Young & Co. v. Shea* rule, that it is discretionary because if a rule of mandatory application it would be a "device [which] curtails the fact finder's freedom to assess the evidence independently" and hence would have no ". . . validity under the Due Process clause". In *Mobile, Jackson & K.C.R.R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910) this Court, in a case where the party burdened was required only to produce evidence following which ". . . the inference . . . [was] . . . at an end", held that for a presumption in a civil case to withstand the test of constitutionality ". . . there [must] be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbi-

trary mandate". In addition, the party against whom the inference is drawn must not be precluded from presenting his or her evidence to the contrary. See also, Notes of Advisory Committee on Proposed Rules, F.R.Evid. 301 reprinted in 28 United States Code Annotated, Federal Rules of Evidence Rules 1-700 at p.101 (West Publishing Co.). Maher Terminals, Inc. *was* precluded from having its evidence accepted since "contrary to the purposes and policy of the Longshore Act" and it could not have prevailed whatever the proof.

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), this Court upheld as constitutional a state statute containing a presumption against death by suicide which required that the party opposing establish that death resulted from accident. In *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929) it found a so-called "anti-railroad" presumption to violate due process because thought to an impermissible extent to treat presumptions as evidence. Concern for the constitutionality of presumption is, of course, more prominent in criminal cases. See, *Tot v. United States*, 319 U.S. 463 (1943). Presumptions requiring stronger evidence for rebuttal have been justified by "comparative convenience", i.e., because the party against the inference is drawn is better able to disprove the fact presumed than the party in whose favor it was created can prove it. *Morrison v. California*, 291 U.S. 82 (1934). In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) this Court applied the rational connection test to presumptions created as a matter of economic regulation. Products liability law presumes facts which might be said to be without logical connection, but has not been successfully challenged on due process grounds. A presumption of accident in a case of unexplained death is "natural" and *has* rational connection for reasons explained in *DelVecchio v. Bowers*; and so have all the Longshore Act presumptions save for the Section 20(a) presumption. Presumptions in the law of products liability operate to establish liability for a defect. In workmen's compensation the liability

issue is neither fault nor defect—the test of whether benefits are owed is only connection between disability or death and work. Employment covered by the Longshore Act, unlike coal mining, has never been shown to impose risk of a particular injury or illness. It is no longer anywhere near as dangerous as it was at the time of the 1972 Longshore Act amendments when it was the second most hazardous employment after coal mining (see, *Evans v. Compagnie Maritima Mexicana*, 639 F.2d 848, 851 (2nd Cir. 1981). Government statistics show that today longshoring is not among the forty (40) most dangerous occupations in terms of the number of reported injuries and illnesses in private industry workplaces. See, 1992 survey by *Workplace Injuries and Illnesses in 1992* by Bureau of Labor Statistics, United States Department of Labor dated December 15 993.

Arguably, longshoring involves potential greater risk that if an accident occurs it will result in fatality. In such event no Longshore Act employer would controvert liability if death is not totally the result of employee intoxication (Section 20(c)) or an act of suicide (Section 20(d)), where rational connection exists and, nonetheless, the presumption is a procedural device. In the application of Section 20(a) to claim of connection between employment and disability or death (see, *Swinton v. J. Frank Kelly, supra*) *no* rational connection, however, exists. In such cases if the party opposing a presumption—whether actual or invented, including any rule reallocating the burden of persuasion—is required to disprove the fact presumed the result is a violation of due process. It is the statute's language and any interpretive gloss which is considered in deciding the due process question. *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923). Such rules are unnecessary for the Longshore Act's true humanitarian purpose to be achieved. The Longshore Act, by its Section 2(2) "injury" definition, provides for benefits in the event of occupational disease; but for the employee to be found entitled to benefits he or she must

establish the existence of "any disease arising out of exposure to harmful conditions of the employment when those conditions are present in a peculiar or increased degree by comparison with employment generally". See, *Gencarelle v. General Dynamics*, 892 F.2d 173, 176 (2nd Cir. 1989) quoting Larson, *The Law of Workmen's Compensation*, Section 41.00 at 7-353. This, in addition to what is unmistakably injury caused by an accident imposed externally, is what ". . . . if the disability or death results from an injury" referred to in Section 3(a) means, not that injury is "something gone wrong with the human frame". In such a case claim for benefits for occupational disease and not injury should be made in a way properly avoiding, instead of ignoring, the Longshore Act requirement of proof of an actual injury. Claim of disability caused by heart attack or other vascular accident, or arthritis, which can be shown to the "employment bred", *should* require proof of unusual risk associated with the particular employment for compensation to be owed where disability results; and disability arising at work or after years of employment due to employee susceptibility should not be the employer's liability. It is the Act's provision for benefits in the event of occupational illness which achieves the statute's purpose, without treating benefits as disability or life insurance. See, *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, supra.* It also avoids misapplication of considerations such as "the humanitarian purposes and policies of the Longshore Act" producing unconstitutional results. The "true doubt" rule, if only arguably, is an improvement on the actual doubt rule considered from the due process perspective, another reason why it was created. In cases similar to those presented in the claim against Maher Terminals, where no rational connection whatsoever exists, it nonetheless violates due process. For this reason the sole permissible treatment of the Section 20(a) is as a procedural device which requires evidence production but does not affect the result after rebuttal. For the same reason of lack of rational connection, the burden of persuasion cannot be shifted in such a case from the claimant to the employer, since this, too, is a "purely arbitrary mandate".

POINT VI

THE COURT OF APPEALS WAS RIGHT TO REJECT THE "TRUE DOUBT" RULE AS CONTRARY TO THE ADMINISTRATIVE PROCEDURE ACT

The analysis of the court of appeals in the case against Maher Terminals provides the opportunity for petitioner's argument that the "true doubt" rule does not contravene the Administrative Procedure Act. Color, but not substance, is added to its claim that the court of appeals' decision is error by virtue of the fact that as the court itself acknowledged it is possible to read Procedure Act Section 7(c) and its legislative history together with *Steadman v. SEC*, as suggesting ". . . that the party who seeks a denial of relief is *also* required . . . to sustain such denial by a preponderance of the evidence". (JA 19). This is different as the court recognized from ". . . an interpretation of Section 7(c) that allocates the burden of persuasion *solely* to the party contesting the grant of relief". (JA 19). The agency does not insist upon the latter but upon the right to make the allocation in which event the court of appeals' concern for the impossibility of ". . . adversarial parties [having] to bear the same burden at the same time on the same issues or issue" (*Ibid.*) disappears. Petitioner's analysis of the Procedure Act assumes not only Longshore Act silence but also that the "true doubt" rule is either sound exsisting law or owed deference. Never before has an issue dependent upon two federal statutes been presented so independently of them; despite which the agency says the court of appeals misinterpreted the APA without citing

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) which explains why this statute was enacted.

Because the Administrative Procedure Act establishes the standard of proof, this fact, no less than the existence of Longshore Act Section 20(a) presumption, cannot be ignored in determining whether the Procedure Act also allocates the burden of persuasion. That there is no evidence the agency has heretofore believed the argument it now makes is demonstrated by the extent to which Black Lung Act regulation 20 C.F.R. 718.403 requires interpretation, whereby "burden of proving a fact" becomes a "burden of production", only (Pet. Brief p 30). Had the agency actually thought the Administrative Procedure Act no barrier to imposing the "true doubt" rule in Black Lung Act cases—because no allocation can contravene it and the authorizing statute incorporated provisions of the Longshore Act are allegedly silent—finding the "true doubt" rule in the regulations would not be at all difficult. As a result, the court of appeals could not have concluded that the "true doubt" rule was instead barred by the same regulations which the agency says establish it. Moreover, assuming the agency's view of statutory silence to be adopted in good faith, and that the Black Lung regulations contrary to any reasonable reading allocate, the agency must instead be assumed to have concluded—because otherwise no regulation would be needed—either that because the Administrative Procedure Act establishes the standard it imposes the burden upon claimant; or where the authorizing and administrative statutes are silent and their sound interpretation or proper implementation by regulation do not otherwise provide, that it was intended by Congress to be on the party seeking to change the status quo. Assertion that the court of appeals misread the agency's regulation *and* concluded in error that the Administrative Procedures Act supplied the allocation, in light of the agency's claim of silence, is inconsistent. The agency's rule's imaginary zone establishes that the "true doubt" rule is a violation of the Procedure Act and the burden-shifting position of the

agency contravenes, if not some specific APA provision, the reason it was enacted.

It is not possible to read *Steadman v. SEC* together with the Court's explanations in *Universal Camera Corp. v. NLRB*, *supra*, of why the APA was adopted as establishing, in a case of statutory and regulatory silence, other than that the party seeking to change the status quo was intended by Congress to have the burden of persuasion; but that it would be permissible to reallocate the risk of non-persuasion on secondary questions if appropriate, by making them a matter of affirmative defense. This is what the court of appeals correctly held and why its reasoning is sound. It is one thing to say that the Procedures Act does not *specify* which party to an administrative hearing has the burden of persuasion—the party seeking agency action or the one opposing it—and entirely another to conclude that Congress intended some "determination" affecting outcome in a civil proceeding involving money which requires agency action despite inadequate proof, and not the APA, would supply the answer. This Court has held the Procedure Act was adopted in order to prevent fact finders at administrative hearings from deciding that the agency should take action on the basis of insufficient proof. In this and other ways Congress intended the APA to improve the quality of administrative determinations by making decisional error less likely, concerns violated by the doubt rule in any version. In *Universal Camera Corp. v. NLRB*, *supra*, 340 U.S. at 478-479 (1950) the Court explained Congress' concern about what industry considered a "serious menace"—". . . the notion that it was enough that the evidence supporting the . . . result was 'substantial' when considered by itself"; or which ". . . when viewed in isolation substantiated the . . . [finding]." In *NLRB v. Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300 (1939) before enactment of the Administrative Procedure Act, this Court defined substantial evidence as ". . . more than a scintilla"; and said that "[i]t must be enough to justify if the trial were to a jury, a refusal

to direct a verdict. . .” which “. . . must do more than create a suspicion of the fact to be established”. It is not difficult to believe that a fact finder—where the statute authorizing agency action can be said to have “humanitarian” purpose—might mistakenly conclude that he or she ought to search for evidence which would upon review be deemed to be substantial. It appears, however, that an award even prior to APA enactment based upon “suspicion”, and for this reason the result of doubt, was unlawful. It is also likely that because the civil jury trial standard of proof was included in the review standard before the APA was enacted, many agency finders of fact would have understood that since the jury is instructed to determine fact based upon which evidence preponderates he or she should apply this proof standard in his or her deliberations. But whether or not this is so and it *is* so if preponderance of weight of evidence is the “rock-bottom” standard, the APA was enacted to *prevent* agency determinations of the precise kind the “true doubt” rule, or any such rule, encourages. Search for any evidence which might be deemed substantial, presumptions as evidence and application of petitioner’s principle in any formulation *all* achieve the same result—they allow or, in the case of the “true doubt” rule *require*, the agency to act despite the proponent’s failure of proof. Because the Procedure Act was adopted to remedy misappropriation of the standard of review in finding facts, and it is settled that it establishes a standard of proof by the preponderance, this must mean, whenever the authorizing statute does not otherwise provide, that it allocates the burden of persuasion.

If evidence weighing requires a proof standard, the standard of proof must conversely be indication of who, in a proceeding governed by the Administrative Procedures Act where the authorizing statute is (only allegedly) silent, bears the risk of non-persuasion, as the court of appeals concluded. This Court has held that “. . . weighing evidence has relevance only if the evidence on each side is to be measured

against a standard of proof which allocates the risk of error”. *Steadman v. SEC*, *supra*, 450 U.S. at 99. In *Addington v. Texas*, 441 U.S. 418 at 423 (1979) it was said: “The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision”; and that it is the preponderance of the evidence standard which is applicable “in a monetary dispute between private parties . . . [s]ince society has a minimal concern with the outcome . . .”. As petitioner points out (Pet. Brief, p.36) this standard “results in a roughly equal allocation of the risk of error between litigants”. *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Steadman*, *supra*, at p.99. The function of the legal process is, when appropriate, to minimize the risk of erroneous decisions. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958); *Steadman* at 425. The standard of proof which best minimizes this risk is whether a fact or any fact is more likely so than not so as a matter of preponderant evidence. The proof standards “beyond a reasonable doubt” or “clear and convincing” evidence, the former more than the latter, maximizes decisional error, but these examples of legal process function are justified by what is at stake. So does the “true doubt” rule, especially its imaginary zone, a fact apparent if only it is assumed that closer scrutiny and renewed careful analysis will lead more reliably to a decision reflecting objective fact. The actual doubt rule, of course, ignores the requirement that the legal process minimize error, since preferring avoidance of mistake in denying benefits even if this means that the administrative law judge does not actually decide any of the essential facts, what occurred in both cases subject to this petition. Both where the agency’s rule and when the actual rule is applied, the finder of fact is improperly allowed not to decide all of the essential issues of fact on the basis of weighing all of the evidence, a result which in enacting the APA Congress intended to prevent. In sum, the “true doubt” rule is entirely inconsistent with the APA statutory scheme. Since it establishes the burden and allegedly does not effect the standard of

proof it is obviously *designed* to, if possible, avoid the Procedure Act, 5 U.S.C. Section 559, bar to supesedure *no less than* to circumvent the presumptions as evidence objection to the actual doubt rule. It is also merely the sucessor to previous *false* doubt rules. In order: presumptions are evidence; the fact finder should be permitted to search for evidence which can be deemed to be substantial; and a lowered standard of proof ought be applied to the evidence of the proponent of agency action because of the authorizing statute's "humanitarian" purpose.

POINT VII

THE "TRUE DOUBT" RULE IS IN ANY EVENT NOT A REASONABLE OR PRUDENT INTERPRETATION

The agency makes argument for statutory authorization of its determination on the basis only of Longshore Act Section 23(a) which provides that claim adjudications "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure" and, therefore, has nothing at all to do with the issues raised by its petition. This argument establishes, however, yet another paradox resulting from the claim of need of agency "flexibility" (Pet. Brief p.23) in the "LHWCA administrative scheme" (*Ibid.*) although were the "true doubt" rule valid the employer would inflexibly bear the risk of non-persuasion on all questions. Its also claims that the Longshore Act ". . . is a remedial statute that should be construed liberally in favor of the employee or his [or her] dependents" and as a result claims for benefits should be met with "certain and immediate recovery" (Pet. Brief p.25), an argument which is circular. The agency's claim that the true doubt rule is not unfair to employers is based upon assertion that employer liability for compensation requires "liberality towards claimants" because the " 'quid pro quo for employers' immunity from potentially ruinous com-

mon-law tort suits' " (*Ibid* at p.26), an argument which establishes that the agency has no insight, much less expertise, concerning the cost of Longshore Act benefits to employers. Administrative efficiency is claimed because ". . . the hazardous nature of longshore work . . ." means the "true doubt" rule will ". . . increase[ ] the probability that a reported injury will in fact be work-related" (sic) (*Id.* at p.25), an argument too obscure to characterize. Agency assertion that the "true doubt" rule is justified as another of the ". . . special rules historically fashioned to protect maritime workers" fails to recognize the special rule of seamen's releases set out in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1943) has been held not to apply to Longshore Act employees who cannot be seamen by provision of Section 2(3). See, *Lampis Navigation, Ltd. v. Ortiz de Costes*, 694 F.2d 934, 936 (2nd Cir. 1982). Of these arguments, the one most illustrative of the importance of the agency's error is the claim that Longshore Act employers are protected by their obligation to pay benefits from far more expensive damage suits.

Longshore Act Section 42 requires that the secretary issue a report and these have included analysis of annual total cost to employers of Longshore Act benefits. Maximum benefits today are $738.30 *per week* and are tax free. Despite having this information, the agency has shown itself incapable of making a competent comparison of what compensation benefits are in relation to liability for damages. Correct analysis would establish, contrary to petitioner's argument, that in many, if not most, cases Longshore Act employers should prefer to be sued for damages rather than pay Longshore Act benefits. The expanded scope of the Longshore Act and the generosity of Longshore Act benefits as a result of the 1972 amendments *alone* demonstrate that Congress *could not* have intended that the employer be obliged to prove that benefits are not owed. The amendments extended Longshore Act coverage very significantly. See, *Northeast Marine Terminals, Co., Inc. v. Caputo*, 432 U.S. 249 (1977). *Edmonds v. Com-*

pagnie Generale Transatlantique, 443 U.S. 256 (1979) held that in amending the Longshore Act in 1972 "Congress made a determined effort to narrow the gap" between recoverable damages and benefits. *Morrison-Knudsen Const. Co. v. Director, OWCP, supra*, 461 U.S. at 636 held that the 1972 amendments were based on compromise and as a result were *not* remedial. In *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 83 (1980) this Court observed that prior to the 1972 amendments ". . . third-party actions had resulted in congested courts and the primary beneficiaries had been lawyers, not injured longshoremen", which suggests that not infrequently before the amendments when maximum benefits of $70.00 per week (H.R. 92-1441 (1972)) or less than 10% of what they are today, Longshore Act compensation was equivalent to damages net of attorneys' fees in cases usually tried to juries.

Tort recovery includes medical expenses and economic loss as well as damages for pain and suffering. A Longshore Act employer is liable for medical expenses, including "surgical and other attendance or treatment, nurse and hospital service, medical crutches and apparatus" pursuant to Section 7. In suit under federal statutes economic loss is calculated based on diminished income stream net of taxes. *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 493-494 (1980); and unreimbursed employee costs must also be deducted. See, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 534, n.10 (1983), a case in which this Court observed that in calculation of lost future wages the probability of employment as a matter of statistics at age 65 "drops to zero". Longshore Act Section 8(a) and (b) provides for payment of compensation equal to two-thirds of the injured employee's average weekly wage subject to cap provided by Section 6 in the amount of 200% of the national average weekly wage. Until Longshore Act Section 9 amendment in 1984 death benefits were not subject to the Section 6 maximum. *Director, OWCP v. Rassmussen*, 440 U.S. 29 (1979). Compensation payments to totally disabled employees or death benefits recipients

from 1972 to further Longshore Act amendment (Pub.L. 98-426, Section 10(b)) adding present Section 10(f)) were increased annually even if subject to Section 6 by the inflation rate. Now they are payable with annual increases of 5% or the rate of inflation, whichever is less. Where an injured employee's wage history shows that his or her pre-injury earnings were insubstantial, Section 10(c) requires that average weekly wage be calculated on the basis of an estimate which "shall reasonably represent the annual earning capacity of the injured employee". After 1972 employers were also liable as insurers of the life of any employee determined to be permanently totally disabled, since until 1984 benefits were owed to his or her dependents even where death was due to "unrelated causes". See, *State Ins. Fund v. Pesce*, 548 F.2d 1112 (2nd Cir. 1977). Benefits for total disability are payable "during the continuance of such total disability", which means that they are owed for life. Tort law provides that the person liable in a case of a pre-existing condition is liable only to the extent of aggravation. In compensation, benefits for total disability are, instead, owed if only injury combines with pre-existing factors to produce disability; and to hasten death to any extent is to cause it. The Section 8(f) so-called second injury fund offers employers no relief when injury causes total disability as a result of aggravation since created wholly by employer contributions. Neither fault nor comparative negligence exist in compensation, obviously.

These facts, all of which rebut the agency's "ruinous tort suit" argument for "true doubt" rule fairness, are reflected in *Estate of Cowart v. Nicholas Drilling Co., supra*, a case establishing that suit pursuant to Section 5(b) is both a hazard to a Longshore Act employee and a potential benefit to his or her employer even when the third party case settlement is completely funded by it although immune from suit. Analysis of whether suits for damages are the more ruinous, in fact, depends to a significant extent upon the employee's age and whether the circumstances of injury imply contributory

fault. When the gap between age at the time of accident and 65 is less than the period from age 65 until end of statistical life expectancy; or when injury occurs for reason of at all significant employee fault, the employer's liability for compensation is typically greater, especially since older employees tend to suffer conditions subject to being aggravated which would have worsened with time had no injury occurred. There is no question at all that liability for benefits will be significantly increased if the "true doubt" rule is found to apply and, as of course it will be, is combined with the Longshore Act aggravation rule. The "virtue" of the actual doubt rule is that it need not be applied; its vice, correspondingly, is that it is not law. As of decision in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 159, n.34 (1987) the agency was unable to demonstrate that any doubt rule had ever been applied in a Black Lung Benefits Act case. Now the agency asks for deference to a rule which must be applied in *all cases* and as a result every Longshore Act employer is at grave risk of increased compensation liability beyond its resources to pay.

In *Addington v. Texas, supra*, the Court suggested that which standard of proof applies may not always make a difference, but that the standard chosen acts as a signal indicating the extent of society's concern for the outcome. It should not be assumed that reallocation of the burden of persuasion would have only limited impact because determining outcome in only "few cases" as the agency claims. Were this Court to embrace the view that Congress intended that Longshore Act fact finding favor the employee, it would send a clear and powerful signal to administrative law judges how controverted claims preferably should be decided. The agency's lack of candor regarding use of the "true doubt" rule in the cases subject to its petition and its failure to disclose the bases for objection to it and the actual rule is awkward in light of this fact. And it is hard to understand how the secretary could adopt a "determination" so potentially antago-

nistic to the future of Longshore Act employment. Petitioner, of course, does not identify by whom the determination was made or its basis, and for this reason trivializes the concept of deference. The agency also does not explain how it actually can be that an ALJ cannot decide which version of fact he or she believes; or why finding that evidence is in equipoise, as a matter of policy, should be encouraged. As employed, the agency's rule may treat "equally probative" as the same thing as "in equipoise" although the former is not an assessment *necessarially* dependent on credibility, as the award in the case against Maher Terminals demonstrates. If so, the fact finder will still be permitted to search for evidence which, considered in isolation, provides only an alleged substantial evidence basis for agency action.

CONCLUSION

The court of appeals correctly determined that the Administrative Procedure Act bars use of the agency rule. This result is further justified by the provisions of the Longshore Act as well as the treatment of the effect of presumptions in federal law. The decisions in the cases against Maher Terminals and Greenwich Collieries should be affirmed.

Dated: New York, New York
March 30, 1994

Respectfully submitted,

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APPENDIX

APPENDIX

1. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 902. Definitions:

When used in this chapter–

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

2. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 903. Coverage:

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

* * *

3. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 919(d):

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5.

Any such hearing shall be conducted by a administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972 in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

4. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 920. Presumptions:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or anther.

5. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 921:

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceedings unless order by the Board. No stay shall be

issued unless irreparable injury would otherwise ensure to the employer or carrier.

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

4. Administrative Procedure Act, 5 U.S.C. Section 557, Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with Section 556 of this Title.

* * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

1. proposed findings and conclusions; or
2. exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
3. supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or except presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

(A) findings and conclusions, and all the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * *

CERTIFICATE OF SERVICE

I, JOSEPH T. STEARNS, an attorney admitted *pro hac vice* before this Court, hereby certify that on March 30, 1994 I served true and accurate copies of the above Brief of Maher Terminals, Inc. via first class mail, postage prepaid, upon:

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